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FEMINIST PERSPECTIVES ON LAW

1992-93

THE LEGAL REGULATION OF REPRODUCTION

Rosemary Coombe
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FEMINIST PERSPECTIVES ON LAW:

The Legal Regulation of Reproduction

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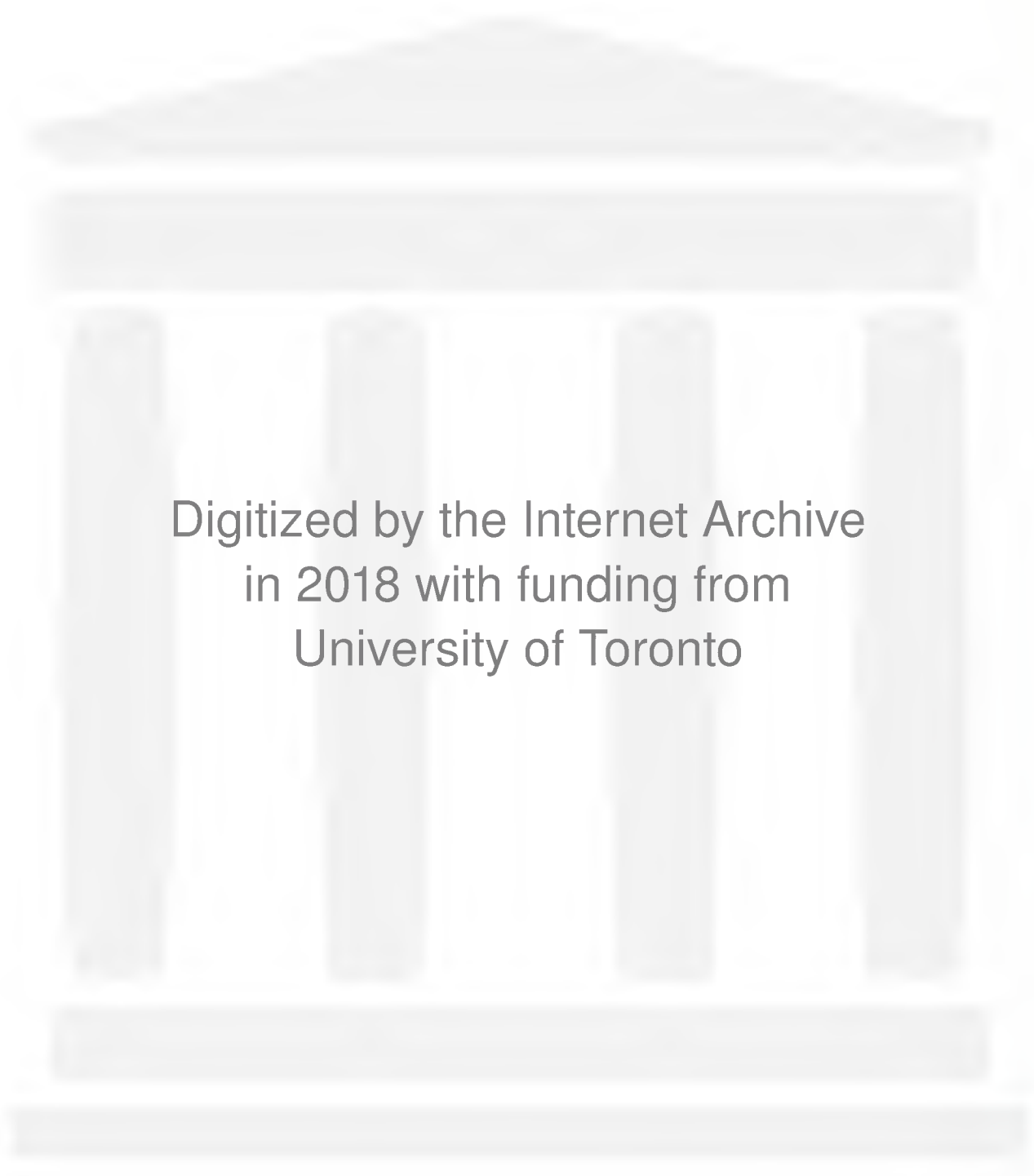
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FAMILY LAW ACT, S.O. 1986, c. 4

Preamble Whereas it is desirable to encourage and strengthen the role of the family, and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

• • •

Equalization of net family properties 5.—(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

• • •

Purpose (7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

Divorce Act, 1985, S.C. 1986, c. 4.

15. . . .

(2) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring one spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of

- (a) the other spouse;
- (b) any or all children of the marriage; or
- (c) the other spouse and any or all children of the marriage.

• • •

(7) An order made under this section that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the

care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Note:

The first two cases in the materials which follow, Karlovec v. Karlovec and Bast v. Bast are fairly typical examples of the kinds of support awards made under the new regime of family law which was introduced in the 1980's. Spouses divide their property equally and then support is awarded to the wife for a time-limited period (typically two to five years) to "rehabilitate" herself and re-establish financial independence.

The law has started to respond to criticisms that these outcomes are unfair to women who have sacrificed employment opportunities in order to care for children. A new form of support, called compensatory support and grounded in s.15(7)(a) of the Divorce Act, 1985 has been recognized by some courts, most notably in two Ontario cases, Ormerod v. Ormerod (1990), 27 R.F.L. (3d) 225 (Ont. U.F.C.) and Elliot v. Elliot, (unreported, August 1992, Steinberg J., Ont. U.F.C.). In both Ormerod and Elliot the award was based upon economic evidence which had been submitted by the wife quantifying her future economic loss (i.e. after marriage breakdown) due to her years out of the workforce during marriage. In Ormerod the wife, who had been a nurse during the early part of her marriage, was awarded \$103,000 to compensate her for loss due to 12 years out of the workforce to care for children. This was in addition to her half share of the property (which equalled approximately \$100,000). The second decision, Elliot, is described in the materials which follow. Elliot is being appealed to the Ontario Court of Appeal. Recognizing the cost implications of introducing economic evidence in spousal support cases, the Federal Department of Justice has prepared a report, also described in the materials which follow, which quantifies economic loss due to labour force interruptions in a range of circumstances and which it is hoped judges will draw on in assessing support.

As the final readings in this collection reveal, the idea of compensatory support based upon economic loss due to labour force interruptions has created a great deal of controversy. Even feminist law reformers disagree on whether this is the appropriate way in which to provide social recognition to and support for child-raising, illustrating the variety of feminist perspectives and concerns which can be brought to a particular issue.

INTRODUCTORY NOTE TO MORGENTALER EXTRACTS

The following readings are extracts from the Supreme Court of Canada's judgment in Morgentaler, Smoling and Scott v. The Queen. The Court, by a margin of 5 to 2, invalidated section 251 of the Criminal Code as infringing rights guaranteed under s. 7 of the Charter. Section 7 of the Charter reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 251 of the Criminal Code prohibited abortions other than those for which permission had been granted by a therapeutic abortion committee because the pregnant woman's life or health was likely to be in danger. The exemption had been added to the Criminal Code in 1969 at the time that prohibitions against sale and advertising of contraceptives and consensual adult homosexual acts were dropped. Then Prime Minister Trudeau declared that the state had no business in the bedrooms of the nation.

The Morgentaler judgment was an event. The decision suprised the federal government and the legal community at large. The Dickson judgment is most frequently quoted while the Wilson judgment was widely praised and condemned.

Two of the majority judgments focussed on the constitutional significance of the functioning of the scheme. Dickson (with whom Justice Lamer concurred) held that the standard of endangerment to life or health infringed the pregnant woman's right to security of the person by ignoring her "priorities and aspirations". This formulation has come to encapsulate the judgment in the media coverage of the abortion issue. He also held that fundamental justice was denied because the system did not make the exemption to criminality available on a fair basis to all possible applicants.

Justice Beetz (with whom Justice Estey concurred) focused on the way in which s. 251 obstructed access to therapeutic medical care and thus security of the person. He then held that this interference was contrary to the principles of fundamental justice because features of the system delayed access to abortion.

The extracts that follow are from the Beetz and Wilson majority judgments as well as from the dissent written by McIntyre J. (with Justice LaForest concurring). You will read more of the judgment in your Constitutional Law Course.

When you read these extracts, consider both the implicit and explicit attitudes to the Charter's guarantees, the judicial role, and women's lives. Also consider the content of the factual record before the court and its influence upon the various formulations of legal argument.